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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LILLIAN ROBERTS,
AS COMMISSIONER OF LABOR
OF THE STATE OF NEW YORK,
Appellant,

v.

BURLINGTON INDUSTRIES, INC.,
Appellee.

IRVING GILBERT, *ET AL.*,
Appellants,

v.

BURLINGTON INDUSTRIES, INC.,
Appellee.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATES AS *AMICI CURIAE* SUPPORTING APPELLANTS*

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BRIEF OF THE STATES AS *AMICI CURIAE* SUPPORTING APPELLANTS

STATEMENT OF INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is filed as a matter of right under Rule 36, Supreme Court Rules, which permits the filing of such a brief without consent of the parties or leave of the Court when presented for a State sponsored by its Attorney General.

The issues raised by these cases on appeal are of great interest to all states, including the following, which join in this brief: the States of Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming (hereinafter "the *amici* states").

The decision below held that § 198–c, of the New York Labor Law and the state common law of contracts are preempted by ERISA insofar as they relate to the severance policy of appellee Burlington Industries, Inc. (hereafter Burlington). The purpose of § 198–c is essentially to enforce the payment of wages earned by and due to employees. At least 46 other states, including most *amici* states have statutes to enforce wage payment. Thirty-one of these statutes include severance benefits among the wages whose payment is enforced. Moreover, similar to New York virtually all states have a common law of contracts which is applicable to any agreement to pay severance wages. The continued viability of these statutes and laws, which is of great concern to all states, is brought into serious question by the preemptive determination made in this case below. The State of North Carolina has a special interest in this case because its Commissioner of Labor has given notice of appeal in the case of *Slack and Brooks v. Burlington Industries, Inc.*, United States Court of Appeals, Fourth Circuit (No. 84–2257, September 3, 1985), which involves the same issues presented in the instant appeal. Should the issues be decided by this Court as they were below, the authority of states to enforce payment of wages to their residents will be greatly reduced. The substantial interest of the states to retain their traditional authority to protect their citizenry through wage payment enforcement prompts the *amici* states to file this brief.

SUMMARY OF ARGUMENT

The *amici* states respectfully urge this Court to grant plenary consideration on appeal to the substantial federal preemption question raised in the appeals by the *Gilbert* plaintiffs and the intervenor-plaintiff Lillian Roberts, Commissioner of Labor of the State of New York. The issues raised by these appeals are of vital concern to the states and affect an area of employee welfare which has been overwhelmingly a state responsibility. The question whether an employer's simple agreement to pay severance pay constitutes an employee welfare benefit plan within the meaning of ERISA, so that state wage enforcement statutes and common law are preempted, is one which has not been addressed by this Court. The answer to this question will have nationwide impact affecting procedures and protections offered by the states to millions of employees. Such draconian results were never intended by Congress and merit this Court's consideration.

The decision of the court below appealed in this case presents a substantial question of statutory interpretation. Although there is no doubt that ERISA has a broad reach, that reach remains limited to employee welfare benefits "plans" and does not encompass a promise or agreement by an employer to pay workers out of general assets. Such a payroll practice in no way rises to the level of a "plan" subject to ERISA. A plan which is subject to ERISA is a formally structured entity with assets and an identity separate and apart from the employer. If the detailed requirements found in ERISA's provisions are to have any meaning, then the statute must be interpreted to limit its scope to those "plans" which were the subject of Congress's concern, and not to include simple contract agreements already addressed by common law and state oversight.

Finally, miscomprehension of ERISA's scope and thus the extent of its preemption has given rise to conflicting decisions between circuit courts of appeals. Therefore, the *amici* states contend these appeals present compelling issues meriting the attention of this Court.

I. This Court Should Grant Plenary Consideration On Appeal Because The Questions Presented Are Of Great Importance To Virtually All States And To Millions Of Persons Employed In Those States.

The resolution of the issues presented in this case has far-reaching consequences affecting virtually all, if not indeed all, states. Forty-six (46) states and the District of Columbia have statutes which require payment of wages, similar to the New York statute which was held below to be preempted. Of these forty-seven (47) jurisdictions, thirty-one (31) enforce payment of promised severance pay under their wage collection statutes. Moreover, in nearly all, if not all fifty states, promised severance payments are enforceable under each state's common law of contracts, which was also held below to be preempted.

Virtually millions of employees will lose protection of their right to severance pay under state wage collection laws if the decision below is affirmed. A recent Bureau of Labor Statistics study of twenty-one million employees from a cross-section of the nation's medium and large private firms shows that sixty-one percent of professional and administrative employees, fifty-seven percent of technical and clerical employees and thirty percent of production employees are eligible for severance pay under their employers' policies. See "Employee Benefits in Medium and Large Firms, 1984," U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2237 (June 1985).

The issue of preemption of these state laws and statutes is significant for several qualitative reasons beyond the sheer quantitative effect of voiding so many state laws. First, the question is presented whether Congress intended ERISA to upset the traditional balance between state and federal enforcement of employee compensation. Other federal laws regulating employee compensation do not seek to impose national uniformity through broad preemption provisions, but instead permit the states to provide more stringent protections if they wish. *See, e.g.*, the Fair Labor Standards Act, 29 U.S.C. § 218 (1982); the Age Discrimination in Employment Act, 29 U.S.C. § 633 (1982); and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000h–4 (1982). Partially in response to this encouragement and, in part, to reinforce and facilitate the common law mechanisms of employee compensation enforcement, the vast majority of states have adopted wage payment collection statutes. Thus, one of the significant issues brought before the Court is whether the numerous state regulatory schemes encouraged by Congress through other enactments, which continue to exist, are suddenly and decisively voided by ERISA.

Second, is the qualitative significance of the deleterious impact which ERISA preemption of state laws will have on the ability of millions of employees to collect their severance benefits. This impact results from both a loss of access to enforcement assistance under state laws and to the less onerous standard of conduct which applies to fiduciaries under ERISA than applies to employers under state laws. Each of the thirty–one jurisdictions having a statute enforcing promised severance pay provides administrative assistance to employees in substantiating and collecting their claimed benefits. Combined, these states and the District of Columbia maintain staffs of more than 1,000 persons to provide

this assistance.[1] Should the administrative assistance fail, eighteen of those thirty-one jurisdictions can seek criminal sanctions and twenty-one can file civil suit on behalf of employees against violating employers. Such assistance is critical to employees because in many instances the number of employees and the amount of money involved in a severance claim is so small that the cost to the employee of pursuing the claim on his own is prohibitive. These resources are either clearly lacking or greatly diminished for the employee in claims arising under ERISA. There are no provisions in ERISA for criminal sanctions for nonpayment of benefits. Moreover, the administrative and litigation assistance offered by the United States Department of Labor under ERISA is greatly reduced, if it exists at all.[2]

Should the decision below be allowed to stand, not only will employees seeking to recover severance pay lose significant State assistance, but they will also have

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[1]Appendix I contains examples of the assistance available to employees in several of the *amici* jurisdictions. Appendix C to the Jurisdictional Statement of appellants Irving Gilbert, *et al.*, lists citations to all state statutes under which such assistance is given.

[2]For example, North Carolina has eighteen (18) compliance officers to investigate and resolve complaints of nonpayment of wages, including severance pay. By comparison, the Atlanta regional office of the Labor Management Services Administration, which among its other duties enforces ERISA, has ten (10) investigating officers to handle complaints in a four state area, including North Carolina. None of its investigators reside in North Carolina. By sheer remoteness, size of territory and lack of numbers, the federal staff cannot approximate the administrative assistance offered by the State of North Carolina. Employees in other states may be worse off. The Dallas office of the Labor Management Services Administration has informed the Wyoming Department of Labor that due to the remoteness, vast area, and sparse population of Wyoming and its own paucity of staff, no ERISA complaints originating from Wyoming will be investigated unless large quantities of money and employees are involved.

a more difficult standard of proof. The courts have generally held that an employee seeking payment of benefits under ERISA must prove the plan administrator acted arbitrarily and capriciously in denying the benefits sought. *See, e.g., Pompano v. Michael Schiavone & Sons, Inc.,* 680 F.2d 911 (2d Cir. 1982); *Horn v. Mullins,* 650 F.2d 35 (4th Cir. 1981); *Smith v. CMTA-IAM Pension Trust,* 654 F.2d 650 (9th Cir. 1981). Under state wage collection statutes and common law contract actions, on the other hand, an employee need only show the employer's contractual obligation to pay the benefits sought and the breach of that promise.

When employees are subjected to this more difficult burden of proof under ERISA, they are often unable to recover benefits which they would be entitled to recover under state law. For example, the Fourth Circuit has recently upheld a decision denying severance pay to former Burlington Industries employees terminated in North Carolina by applying the standard of arbitrary and capricious conduct. *Slack and Brooks v. Burlington Industries, Inc.,* United States Court of Appeals, Fourth Circuit, Nos. 84-2241(L) and 84-2257, September 3, 1985.[3] Earlier, however, the North Carolina Department of Labor had determined that the employees were due the severance pay under the North Carolina Wage and Hour Act, which codifies common law principles of contract as they apply to wage and benefit payments.

This Court should grant full hearing to these appeals in order to resolve whether ERISA should be interpreted to decrease the likelihood that employees will recover promised severance pay by restricting the right of employees to collect benefits to which they are entitled

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[3]The Fourth Circuit decision, which involved the same sale which is the subject of this proceeding, is also currently on appeal to this Court.

under state law. First, such an interpretation is contrary to the stated Congressional intent in adopting ERISA to increase the protection for participants and beneficiaries of employee plans. *See,* 29 U.S.C. § 1001, Findings and Declaration of Policy. Should this Court let stand the decision below, then ironically ERISA's application may well have the opposite effect of that intended by Congress in that employee protection will have actually decreased rather than increased as a result of ERISA.

Second, decreasing the likelihood that employees will receive their promised severance pay will adversely affect the states and their citizens. Protection of the financial and general well-being of wage earners and their families has been an area of significant state interest and action. If employees are not paid their severance wages when due, they and their families often suffer severe financial hardships. Many wage earners live on such tight budgets that the loss of just one paycheck can result in a family crisis. Rent goes unpaid, utilities are shut off, or sufficient amounts of food and other necessities are not affordable. States have a substantial interest in preventing such hardships by assuring prompt payment of all severance wages. When earned severance wages go unpaid and financial crises strike families, states often bear additional financial burdens through social service programs designed to protect the general welfare of the states' citizens. Unemployment benefits, general and special assistance, and other costly forms of social relief increase when earned wages go unpaid. These social programs cost the State and their taxpayers great sums of money. It is very much in the states' interest to minimize these expenses by enforcing payment of all severance wages earned.

The issues presented by this case are also significant because the Court of Appeals' expansive reading of ERISA's preemption provision and definition of an "employee benefit plan" threatens many other state statutes

which in some way involve or touch upon employee benefits. By reading ERISA's definition of benefit plan out of the context of ERISA's entire legislative framework and history, the court below interpreted that section to include mere promises consisting of no more than written statements of policy that have no identity apart from the employer itself. The court's holding could equally be applied to promises to provide periodic or occasional training, or even child care, since ERISA's definition of a benefit plan expressly encompasses plans that provide such benefits. *See,* 29 U.S.C. § 1002(1)(A).

II. Appellants Present The Substantial Question Whether A Promise Or Agreement To Pay Severance, Without More, Does Not Constitute A Welfare Benefit Plan Within The Meaning Of ERISA.

Congress enacted ERISA in an effort to protect employees whose pensions, annuities, retirement and other benefits were tied up in and dependent upon complex plans about which they knew little or nothing, and some of which were fraudulently or negligently mismanaged and subject to haphazard regulation. It sought to regulate pension plans and, to a lesser extent, other types of benefit plans, in order to help insure employees a modicum of security in the expectation of benefits. As Congress declared, "the continued well-being and security of millions of employees and their dependents are directly affected by these plans . . ., that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided . . . ." 29 U.S.C. § 1001(a).

In the instant case, whether defendant's practice of granting severance pay is a "plan" governed by the provisions of ERISA is a threshold question. If it is not a

plan within the ambit of ERISA, then New York's statutory and common law are not superseded or preempted and the provisions of ERISA do not affect or have application to plaintiffs' right to recover. The court below erred in concluding that defendant's promise to pay severance pay is an "employee welfare benefit plan" subject to ERISA.

The Department of Labor has promulgated a series of interpretive regulations that touch on this question. Unfortunately, when analyzed, the regulations do not squarely answer the question presented herein because they interpret the phrase "welfare benefit" and not the word "plan." However, the regulations do lend support to the conclusion that benefits merely promised by an employer are to be distinguished from welfare benefit plans regulated by ERISA. When vacation pay, holiday pay, sick pay and similar wage-related benefits are paid by the employer from its general assets, the Secretary has interpreted those benefits to be payroll practices rather than part of a welfare benefit plan. *See,* 29 C.F.R. 2510.3-1(b). Since vacation, holiday and sick pay are benefits listed in the ERISA definition of welfare benefit plan,[4] through this regulation the Secretary is explicitly recognizing that the mere promise of the listed benefits by an employer falls short of qualifying as a welfare benefit plan.

The court below concluded that severance pay is a benefit listed in the definition of welfare benefit plan, but it glossed over the issue of whether every promise to pay severance benefits constitutes a welfare benefit plan regulated by ERISA. The Secretary's regulation suggests, on the other hand, that it is also necessary to answer the question of whether a welfare benefit plan exists, before finding coverage by ERISA. In that the decision below ignores this question, if left to stand, it

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[4] *See,* 29 U.S.C. § 1002(1).

will become guiding precedent for the proposition that any employer promise or provision for benefits listed in ERISA will always constitute a benefit plan.

The question left unanswered by the regulations and now presented to this Court is one of statutory interpretation. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an "employee welfare benefit plan" or "welfare plan" as:

> [A]ny plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Few courts have grappled with interpreting § 3(1) of ERISA, but it is clear from the definition itself that an ERISA covered welfare plan must be (1) a plan, fund, or program, (2) established or maintained, (3) by an employer or an employee organization, or both, (4) for the purpose of providing the benefits enumerated in § 1002(1)(A) or described in § 302(c) of the Labor Management Relations Act ("LMRA"), (5) to participants. *See, Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982). However, although it is clear on its face that the statute covers any plan, fund or program, the terms "plan" and "program" are not defined in the statute.

Therefore, it is necessary to look at the structure of ERISA's regulating provisions and the intent of Congress to distinguish a welfare benefit "plan" covered by ERISA from mere benefits.

The statutory scheme for ERISA demonstrates that Congress contemplated that a "plan" under ERISA would have a structure giving it an identity of its own separate and apart from the employer. Sections 1102(a) and (b) of the Act suggest what features must be present before a plan can be said to exist, such as a written instrument which (1) names a fiduciary, (2) provides a procedure for establishing and carrying out a funding policy, (3) allocates responsibility among those who will operate and administer the plan, (4) establishes procedures for amending the plan, (5) identifies the persons who will have the authority to amend, and (6) specifies the basis on which payments will be made to and from the plan. 29 U.S.C. § 1102(a) and (b). Under 29 U.S.C. § 1022, a plan administrator is required to file a "plan description" with the United States Department of Labor and to distribute a summary of that plan description to participants and beneficiaries. ERISA also requires the plan administrator to publish and file an annual report for the plan. 29 U.S.C. § 1023 and 1024. Additionally employers must establish and maintain procedures for the timely handling and disposition of day-to-day benefit claims including an understandable written notice setting forth the specific reasons for denial of a claim and a full and prompt fair review of the denial. 29 U.S.C. § 1133.

In addition to the mechanics of establishing a plan, ERISA defines the terms "welfare plan" and "employer" as separate entities. Compare 29 U.S.C. § 1002(1), which provides that the "terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program . . . established or maintained by an employer . . .," with 29 U.S.C. § 1002(5), which provides that "the term 'employer' means any person acting directly as an employer,

or indirectly in the interest of an employer, *in relation to an employee benefit plan* . . . ." (Emphasis added.) Although they may exist in relationship to one another, the plan and the employer that established it are separate entities and each must have an identity of its own. *See also,* 29 U.S.C. § 1132(d)(1) ("an employee benefit plan may sue or be sued . . . as an entity"); 29 U.S.C. § 1132(d)(2) (Any money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person"); 29 U.S.C. §§ 1106(a) and 1107 (wherein it is assumed that a plan and the employer that established it are separate entities and, on the basis of that assumption, certain transactions between them are prohibited).

The language of the statute and the legislative history clearly demonstrate that for a "plan" as defined by ERISA to exist, the "plan" must either have a source of financing independent from the general assets of the employer or commit itself to establishing a funding policy that will assure that an adequate proportion of the employer's income will be dedicated to the plan. ERISA's legislative history and the Act's formal name clearly demonstrate that its drafters were principally concerned with controlling the kinds of abuses typical of funded pension plans. The purpose of ERISA was to regulate a relatively modern economic institution which, in the years following World War II, had experienced phenomenal expansion. H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 2-3, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4640-41. Several years of hearings and studies by Congress revealed substantial problems in the area of pension plan vesting, funding and fiduciary conduct. "The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private *accumulation* of funds which have escaped the imprimatur of effective federal regulation." H.R. Rep. No. 93-533, 93d Cong., 2nd Sess. 3, *reprinted in* 1974 U.S. Code Cong. &

Admin. News, pp. 4639, 4641. (Emphasis added.) With respect to these plans, participants were left to rely upon the state common law of trusts, which Congress found inadequate. Congress's concern was clearly not directed at employer personnel policies, employment contracts and employer compensation practices, which were hardly recent phenomena and which had been for years effectively regulated and enforced by state wage payment statutes and common law contract principles. Since Congress set out merely to control abuses of pension vesting, funding and fiduciary abuses, an overly-expansive reading of the term "benefit plan" to include all unfunded severance agreements, generally involving smaller amounts of money, would result in a gross distortion of Congress's purpose.

The foregoing analysis clearly indicates that ERISA and Congress contemplated a creature quite different from Burlington's severance pay policy which is funded out of its general assets and which had none of the formal documents and structure required for an employee welfare benefit plan subject to ERISA. It is hardly credible to argue that Burlington's policy was a "plan" under ERISA where none of the characteristics of an ERISA plan are found. Burlington's severance pay policy is nothing more than the employer's agreement to pay severance wages as part of an employee's overall compensation and is not a "plan" covered by ERISA.

Support for the conclusion that every unfunded promise to pay severance pay or other benefits is not an ERISA plan can be found in many state court decisions that have awarded compensation based on theories of contract, promissory estoppel and *quantum meruit*.[5] Many state court decisions have specifically decided employee claims concerning severance pay policies in plant sale and closing situations and have made no reference whatsoever to ERISA. *See, Younger v. Thomas Int'l Corp.,*

[5] *See*, table of state court decisions attached to the Jurisdictional Statement of Appellants Irving Gilbert, *et al., as Appendix D.*

275 Ark. 327, 629 S.W.2d 294 (1982); *Armstrong v. Diamond Shamrock Corp.*, 7 Ohio App. 3d 296, 455 N.E.3d 702 (1982); *Adams v. Associates Corp. of N. America,* 390 So. 2d 539 (La. App. 1980); *Dulany Foods v. Ayers,* 220 Va. 502, 260 S.E.2d 196 (1979); and *Fentron Arch. Metals Div. v. Colavito,* 54 A.D.2d 857, 388 N.Y.S.2d 300 (1976).

Further, this Court has recognized the distinction between an employer that sponsors a plan and the separate entity of the plan itself in the case of *Nachman Corporation v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980). In *Nachman,* it was determined that while a liability disclaimer clause disclaimed any assumption of direct contractual liability by the employer to pay the unfunded portion of certain benefits, it did not make the employees' right to those benefits conditional as against the plan itself. The opinion contemplates that an employer can either choose not to establish a plan, in which case it can also choose whether or not to obligate itself to pay benefits out of its general assets, or, alternatively, it can choose to establish a plan and either assume or not direct liability for any deficiencies in plan assets. In either case, the extent to which the employer is *directly* liable to its employees is a question to be decided in accordance with the terms of the contract into which it has entered.

The *Nachman* analysis leads to four conclusions: (1) there is a meaningful distinction between "employers" and "plans"; (2) for an "employee welfare benefit plan" to be established or maintained within the meaning of the Act, it must be so constituted as to have an identity and character of its own, as distinct from that of the employer; and (3) to the extent that an employee seeks to enforce his rights as against a "plan," he must do so under ERISA, *see* 29 U.S.C. §§ 1132 and 1144(a); but (4) to the extent that he seeks to enforce any rights directly against his employer, his cause of action lies in contract. Hence, recovery of promised severance pay or other benefits from an employer, opposed to recovery

from a "plan," is not preempted by ERISA. Statutory and common law remedies remain viable and should not have been dismissed by the court below. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

III. The Court Should Grant Full Consideration On Appeal To Resolve A Conflict Between Circuit Courts Of Appeals.

In the decision on appeal here, the Second Circuit Court of Appeals held that the preemption provision of ERISA precludes a lawsuit against an employer under state wage payment collection laws to enforce the employer's direct promise to make payments of benefits. The Third Circuit Court of Appeals, on the other hand, in *Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983), held that the preemption provisions of ERISA do not preclude a lawsuit against an employer under a state wage payment collection law to enforce an employer's direct promise to make payments into an ERISA-covered employee benefit plan. To the extent that one decision interprets ERISA to permit lawsuits under state law to enforce direct employer promises while the other does not, the decisions of these Circuits are in conflict, and it is appropriate for this Court to give full hearing to the present appeals in order to resolve that conflict.

In the *Ambrose* case, the Carpenters Health and Welfare Fund of Philadelphia and Vicinity (the "Fund") filed suit against Kenneth R. Ambrose, Inc. (Ambrose, Inc.) to recover delinquent contributions owed to the Fund under a collective bargaining agreement. Recovery was sought under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1976).

A pendent state claim was also sought to recover the contributions and to collect liquidated damages equal to 25% of the amount owed, as provided under the Pennsylvania Wage Payment Collection Law ("WPCL"), PA. STAT. ANN. tit. 43, § 260.1–.11 (Purdon Supp. 1983–84). The district court held Ambrose, Inc., liable both for the delinquent contributions under the LMRA and the WPCL, and for the 25% liquidated damages under the WPCL. On appeal to the Third Circuit, Ambrose, Inc., argued that the WPCL was preempted by the LMRA and ERISA. The Court of Appeals dismissed this contention outright:

> The Ambroses also argue that the district court acted without jurisdiction on the WPCL claims and they further contend that the WPCL is preempted by the LMRA and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a) (1976), *amended by* the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1145 (Supp. V–1981), we find that these contentions are without merit.

Carpenters Health and Welfare Fund v. Kenneth R. Ambrose, Inc., supra, 727 F.2d at 282, n.5. Thereafter, the Circuit Court upheld the district court's award of delinquent contributions and liquidated damages under the WPCL.

The Third Circuit does not state in its *Ambrose* opinion a rationale for rejecting ERISA preemption of the Pennsylvania WPCL. While this could be taken as a sign of a lightly considered decision, the better explanation would appear to be that the Third Circuit thought the question had been adequately considered and explained in its earlier decision in *Murphy v. Heppenstall Co.,* 635 F.2d 233 (3d Cir. 1980, *cert. denied,* 454 U.S. 1142 (1982). In that case, retired employees sued their employer to recover the difference between pension payments guaranteed by the Pension Benefit Guaranty Corporation and those provided for in a pension agreement

which had resulted from collective bargaining. The United States District Court for the Western District of Pennsylvania granted partial summary judgment in favor of the plaintiff-retirees on the issue of liability and, on appeal under 28 U.S.C. § 1292(b), the Third Circuit affirmed.

In rejecting the defendant's argument that ERISA had preempted contract claims against an employer for sums in excess of those guaranteed by the PBGC, the Court construed *Nachman, supra,* as having, by negative implication affirmed the continuing vitality of direct contractual liability:

> [If *Nachman* stands for the proposition that an] employer may limit direct liability [and it does], direct liability must persist under ERISA. Otherwise *Nachman* would nonsensically permit restrictions on a form of liability the statute had precluded.

Murphy, supra, 635 F.2d at 239 (material in brackets added).

Not content to rely on *Nachman* alone, the Court resorted to an examination of the statute itself to ascertain whether there was any inconsistency between the principle of direct contractual liability and the specific provisions and history of the Act. It concluded that there was no inconsistency:

> It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself. While the effect of permitting that additional recovery may reduce the employer's net worth, and thus decrease the amount the PBGC may recover from the employer, the PBGC in its amicus brief to this court has taken a position supporting the employees' right to recover directly from the employer. Because nothing in

> ERISA, nor in its legislative history, nor in the views expressed by the government corporation charged with administering ERISA-guaranteed pension payments discountenances direct contractual recovery of pension benefits from the employer, we will affirm the district court's grant of summary judgment of liability in favor of the employees.

Murphy, supra, 635 F.2d at 239.

Taken together, the *Ambrose* and *Murphy* decisions stand for the proposition that "direct employer liability" is "direct employer liability" regardless of the existence of an ERISA benefit plan. Where an employer contracts to make certain payments or provide certain benefits out of its general assets, it is directly liable to make those payments and provide those benefits to its employees, and its employees are entitled to enforce that liability directly against the employer—in contract or under a state wage and benefit enforcement statute.

These pronouncements of the Third Circuit directly conflict with the decision below in the Second Circuit, which holds that attempts to enforce direct employer liability under state law are precluded by ERISA's preemption of the state laws. Insofar as this conflict exists and will result in inconsistent application of federal law within the various circuits,[6] this Court should exercise its authority to resolve the conflict by granting full consideration to these appeals.

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[6]Recent decisions highlight these inconsistencies. On January 26, 1985, the Western District of Pennsylvania, citing the *Ambrose* decision, allowed recovery under Pennsylvania's WPCL of an employer's delinquent contributions to an ERISA employee benefit plan despite the employer's contention that ERISA preempted the state statute. *Amalgamated Cotton Garment & Allied Industries Fund v. J.B.C. Company of Madera, Inc.,* 27 WH Cases 474 (W.D. Pa. 1985). On September 3, 1985, the Fourth Circuit Court of Appeals, citing the Second Circuit's decision in this case upheld an

[Footnote continued]

CONCLUSION

For all of the foregoing reasons, this Court should summarily reverse the opinion of the court below or grant plenary consideration of the significant question raised by the appeals of the private plaintiffs and the New York Commissioner of Labor who are the appellants in this action.

This the 16th day of October, 1985.

Respectfully submitted,

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employer's contention that ERISA preempts state laws under which employees were seeking to enforce direct employer liability for employee benefits. *Slack and Brooks v. Burlington Industries, Inc., supra.* Thus, a sharp line is being drawn between the decisions in these circuits on the question of whether direct employee promises can be enforced under a state law where ERISA is involved.

APPENDIX

APPENDIX

Summary Description of Wage Payment Laws of Alaska, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Montana North Carolina, Oklahoma, Vermont and Wisconsin

Alaska

Alaska has two wage collection statutes. One provides specifically for actions arising from violations of the minimum wage and/or overtime laws. This statute is commonly referred to as the "Alaska Wage and Hour Act," and closely parallels the FLSA, 1938, as amended. See *AS 23.10.050–.150*

The second statute relates to wage claims, in general. See *AS 23.05.140–.260.* This statute is very similar to the New York statute in its content and administration. Claims accepted under this statute involve the contractual aspect of employment which deal with fringe benefits, primarily vacation or severance pay. An Alaska wage earner may choose a civil remedy either through the resources of the Department of Labor or on his own under a workman's independent right of action. The second remedy is exclusively used where the wages or benefits in question exceed the department's statutory minimum, exclusive of penalties, of $5000. The Department has the authority to use internal administrative adjudication processes to resolve complaints. These processes, however, are not obligatory and the Department may move a claim directly into the courts for a final solution.

The courts are generally reserved for serious disputes or for employers subject to recidivism. Most claims are handled quickly using one or more informal conferences involving an investigator, the claimant, and the employer or employer representative, frequently an attorney. The more formal hearing process is reserved for fact finding to clarify complicated questions of law, or to determine if criminal as well as civil sanctions are in order.

In Alaska there are currently 12 investigators and 4 technicians who investigate claims for wages and benefits or enforce other labor laws. The Department investigates and resolves 1600 claims per year with the average resolution time, outside of court, being 5 months. It may take from 7 months to 2 years to litigate a claim depending on the amount of the claim and legal complexities which dictate whether the matter will be heard at the district or superior court level. About 10 percent of the Department's cases require formal litigation for resolution. The Department's resources are without charge to the claimant while legal fees in the private sector begin at about $85 per hour.

CONNECTICUT

The Connecticut Commissioner of Labor, through the Department of Labor, Division of Regulation of Wage, oversees enforcement of Connecticut's wage payment laws, sections 31-71a through 31-71i, 31-72 and 31-76k, Connecticut General Statutes. Specifically, § 31-76k requires an employer to pay terminated employees all accrued fringe benefits where the employer has a policy or is party to a collective bargaining agreement providing for payment of such benefits upon termination. The fringe benefits covered by section 31-76i include vacations, holidays, sick days and severance pay. When the Department of Labor receives a complaint from a

terminated employee that promised fringe benefits have not been paid, it engages in an administrative investigation through the mails or in person using one of its six Wage Employment Agents. An administrative hearing may be held if necessary to determine disputed issues. When it determines that an employer has unlawfully failed to pay fringe benefits, the Department of Labor can initiate either a criminal action § 31–71g or a civil action under § 31–72 to collect double damages.

District of Columbia

The District of Columbia Wage Payment and Wage Collection Law, 36 D.C. Code §§ 101–110 (1981 ed.) enacted by Congress in 1956 (70 stat. 976), requires employers to make timely payment of wages to employees employed in the District of Columbia.

When an employer fails to pay wages (including vacation pay and severance pay) as required, an aggrieved employee has two recourses: he or she may file an action in court to recover the unpaid wages and liquidated damages, or file a complaint with the Office of Wage–Hour, D.C. Department of Employment Services. If the employee chooses the latter course, the employer is notified by letter of the filing of the complaint and the date and time of an administrative hearing. If a determination is made that the employer is in violation of the law, and refuses to pay the wages found due, the case is transferred to the Corporation Counsel of the District of Columbia for filing of criminal charges or a civil action.

With a staff of 4 wage–hour compliance specialists assigned to investigate complaints and conducting administrative hearings, the staff during the past 5 years (1980–84) has processed 4,564 complaints from employees alleging violation of the Wage Payment and Wage Collection Law. Slightly more than 1 million dollars has been recovered in unpaid wages and damages for employees.

HAWAII

In Hawaii, an employee who is not paid all wages due may either file a claim with the State of Hawaii's Department of Labor and Industrial Relations or bring a civil action in a state court to recover any monies owed.

The Department of Labor and Industrial Relations, under the statutes and administrative rules and regulations relating to the Payment of Wages and Other Compensation Law, Chapter 388, Hawaii Revised Statutes, investigates and conciliates unpaid wage claims including vacation, sick, and severance pay. The law does not require the employer to pay any set amount as pay and benefits, but only to pay what the employer has promised to pay to the employee. If, after an investigation substantiating a claim for unpaid wages or other compensation is completed and the employer fails or refuses to pay the employee, the Department of Labor and Industrial Relations may file a lawsuit on the employee's behalf to collect the amounts owed. If the Department prevails in the lawsuit, the Department may recover, in addition to the unpaid wages, a penalty in an amount up to the amount of the wages due. The court must also order the employer to pay the costs of bringing the action and reasonable attorney's fees.

When the employee brings a civil suit, the employee, too, may recover the civil penalties as well as the costs and reasonable attorney's fees.

The statute also provides for criminal penalties. It is a misdemeanor for any employer to fail to pay wages under the Payment of Wages and Other Compensation Law or for any officer of a corporation to knowingly permit the corporation to fail to pay wages. The employer or officer is subject to a fine of not less than $100 or more than $10,000.

Seven investigators investigate and conciliate the approximately 1,200 claims which are filed each year with the Department. Approximately 90 cases were referred to the Attorney General for legal action during the last completed fiscal year.

Any complaint filed under ERISA is not accepted in Hawaii but must be filed in Washington, D.C. with the Division of Inquiries and Technical Assistance. Whether or not prompt action is taken on these complaints is not known. Therefore, it is very important to the people of Hawaii that the Payment of Wages and Other Compensation Law continue to be applicable in the area of wages and benefits.

ILLINOIS

The Wage Claim Division of the Illinois Department of Labor is responsible for enforcing the Wage Payment and Collection Act, Ill. Rev. Stat., Ch. 48, pars. 39m–1 to 39m–16 (1983).

Section 2 of the Act includes in its definitions of "wages" and "final compensation" any compensation owed an employee by an employer pursuant to an employment contract or agreement between the two parties. Even before this language was added to the statute, an Illinois appellate court construed the Act as covering severance pay claims.

Section 11 of the Act outlines the duties and powers of the Department, which include the authority to take assignments of wage claims and proceed civilly and to cause criminal complaints to be prosecuted. The statute also preserves a private right of action.

Workers who want to file a claim for wages or final compensation fill out a short application form. If the Division has jurisdiction, it writes to the worker's employer and asks for payment or a written response to the claim.

If the employer fails to respond, or if the worker disputes the response, the Wage Claim Division schedules a hearing in one of nine cities: Chicago, Springfield, Rockford, Peoria, Champaign, Marion, Collinsville, Rock Island or Effingham. At the hearing, a labor conciliator listens to both sides and examines any witnesses or written evidence. If the worker and employer do not reach a voluntary settlement, the conciliator either dismisses the claim or issues a demand for payment.

If the employer fails to comply with the demand, the Division institutes prosecution. An employer convicted of violating the Wage Payment and Collection Act can be sentenced to 30 days in jail or fined $500.00 for each day on which a violation occurs.

During the fiscal year ending June 30, 1984, the Illinois Department of Labor received 10,528 wage complaints claiming $15,498,980 due. Of this amount $3,786,232 involved vacation pay, severance pay or other fringe benefits. The Department held 8,827 hearings on wage claims during that year and resolved complaints involving $13,977,315. All of this was accomplished with a staff of fourteen.

MARYLAND

The intent of the Maryland Wage Payment and Collection Law is to provide a quick, simple method for employees to collect monies which were due them for services performed without cost to the employee. There are, of course, other remedies available to employees.

These remedies are, in most instances, time-consuming and involve either considerable cost to the employee or require certain knowledge which the employee does not have. A court date for a civil suit in the lowest state court is usually two to three months in the future. A fee of $250.00 is the minimum charged by an attorney to prepare and litigate even the simplest civil suit. Even with the loose and informal procedures in the small claims court, the employee generally does not have the knowledge to pursue his claim.

The vast majority of claims are for relatively small amounts, usually two weeks pay or less. The claimants are generally in the lowest paid jobs, many working at minimum wage. In 1983, the average amount collected per valid claim was $297.18.

The nature of these claims mandates that they be resolved as quickly as possible. The vast majority of cases received by the Employment Standards Service are resolved within 30 days. An administrative assistant and two clerical employees conduct the office functions; office and field functions are supervised by a Wage and Hour Investigator Supervisor. Approximately 40 percent of all claims are investigated by three specialists; the remainder are assigned to 16 other investigators in their areas of residence. Generally, the issues involved are emotional, requiring the investigator to exercise extreme tact and diplomacy to resolve the claim quickly and to the reasonable satisfaction of both parties. Because of the variety of employers involved, each investigator must have a broad business background.

The Wage Payment and Collection Law is codified as Article 100, Section 94, *Annotated Code of Maryland.* Subsection 94(4)(3) defines wages as "any remuneration, compensation, bonus, commission, and/or fringe benefit

promised in return for services by an employee". By administrative decision, vacation pay, holiday pay, severance pay, pension payments, insurance payments and any and all fringe benefits are included in the definition of wages. Simply stated, the employee must get what he was promised and this agency stands available to investigate all claims of nonpayment of promised monies.

A Wage Payment and Collection claim usually is initiated by a telephone call from an employee: "My boss won't pay me what he owes me". Two claims forms, one a condensed version of the other, are mailed to the employee. Once the completed forms are returned to the Service, confirmation of receipt is sent to the claimant. The condensed form is then sent to the employer with a letter explaining that the Commissioner has received a claim alleging that the employee is due wages which were earned but not paid.

If the employer agrees that the claim is valid, the employer is instructed to forward a check to the Employment Standards Service, payable to the Division of Labor and Industry. If the employer asserts that the claim is invalid, the employer is instructed to provide an explanation and documentary evidence to support the employer's position. The employer is informed that in the event a reply is not received, an investigator will meet with the employer at a specified time and date to attempt to resolve the claim.

In approximately 20 percent of all Wage Payment and Collection cases, a check or other adequate response is received. In these instances, a decision is made without the necessity of a personal visit by an investigator. If a response is not received or is inadequate, a Wage and Hour Investigator visits the employer at the scheduled date and time and attempts to resolve the claim. If

agreement is reached, a check is collected for the claimant. If a claim cannot be resolved and the claim is determined to be valid, the case is sent to the Office of the Attorney General for appropriate legal action.

During 1984, a total of 2,128 claims were investigated. A total of 467 claims were filed for vacation pay or 22% of the total claim filed. Forty-three claims were filed for severance pay, or 2% of the total filed.

The informal, "let's get this dispute settled" method of resolving these claims results in speedy service to the claimant. A more structured approach as practiced by many Federal agencies would result in a long protracted period where the employee would be deprived of wages which are sorely needed. The great number of claims would necessitate a huge increase in the number of federal compliance officers to investigate and resolve the claims. Many claims which are filed with this office are filed as a result of a referral from the Wage and Hour Division of the United States Department of Labor. There is no question but that the individual States are better able to serve the citizens in the collection of unpaid wages.

MONTANA

Montana's Wage Payment Act (Sections 39-3-201 Montana Codes Annotated through Section 39-3-215, MCA) provides one of the two alternatives a wage claimant may use to collect wages.

The other one would be to file a civil suit in court. In most cases court calendars are extremely burdened with cases and resolution is extremely slow.

When a wage claim is received in the office of the Labor Standards Division of the Montana Department of Labor and Industry, an investigation is commenced and a determination reached, if possible, of the validity of the claim.

In the event that either the claimant or respondent feels aggrieved by the determination, they have the right to a hearing. The hearing would be held under the Montana Administrative Procedure Act with rules of civil procedure and evidence applying.

If either party feels aggrieved by the decision of the hearing officer, the only appeal is to the District Court for judicial review. The Labor Standards Division may apply to District Court for a judgment or an order enforcing the decision of the hearing officer or a default order. (*See,* Section 39–3–212, MCA.)

Employers doing business in Montana are not required by law to provide vacation pay, but once promised or made part of the employment agreement that promise must be complied with. *See,* Attorney General's Opinion No. 56, September 17, 1949. Once earned, the vacation pay cannot be withheld by the employer or forfeited by the employee. Similarly, severance pay is not required by law to be given but meets the definition of wages once it's made part of the employment agreement.

In fiscal years 1982–1984, the Montana Department of Labor and Industry handled over 3,000 claims and collected over $1,400,000 in wages and fringe benefits owed.

NORTH CAROLINA

The North Carolina Wage and Hour Act is similar but not identical to New York's statute. If an employee in that state fails to pay an employee all severance wages due, the employee can file a suit on his own under the Wage and Hour Act, or he can file a complaint with the Wage and Hour Division of the North Carolina Department of Labor. If he chooses the latter, the employee draws on the resources of an administrative agency with eighteen compliance officers stationed throughout the State whose primary function is to investigate and conciliate wage payment complaints. Should an employer refuse to pay a claim substantiated by a compliance officer, an administrative process commences which includes an opportunity for a hearing and a final agency determination. If the final decision upholds the claim and the employer still refuses to pay, the employee may request the Department of Labor to file a lawsuit on his behalf to recover the unpaid wages and exemplary damages. The North Carolina Wage and Hour Division investigates over 2,000 such complaints per year and answers the questions of many other potential complainants and employers before a problem develops. Many of the complaints involve unpaid severance pay, vacation pay or other payroll practices.

If a North Carolina employee were restricted to making an ERISA claim only, the resources available to assist him would be much less. The branch of the U.S. Department of Labor which administers ERISA is the Labor Management Services Administration.

OKLAHOMA

Title 40 Oklahoma Statutes 1982—Section 165.1(3) defines wages as follows:

> "Wages" means compensation owed by an employer to an employee for labor or services rendered, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee, which are earned and due, or provided by the employer to his employees in an established policy, whether the amount is determined on a time, task, piece, commission or other basis of calculation.

Under Oklahoma law, holiday pay, vacation pay, severance pay, dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee which are agreed on as an established policy are wages.

Title 40, Oklahoma Statutes 1975, Section 165.11 defines the penalty for failure to pay wages or wage supplements:

> A. In addition to any other penalty or punishment otherwise prescribed by law, any employer who is a voluntary party to or subject to a bona fide written agreement to pay or provide benefits or wage supplements to employees or to a third party or fund for the benefit of employees and who willfully fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty (30) days after such payments are required to be made by law or by agreement, shall be guilty of a misdemeanor, and each such failure to make payment as required herein shall constitute a separate offense.

Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

B. As used in this section, the term "benefits or wage supplements" includes, but is not limited to, reimbursement for expenses as agreed prior to contracting said expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay.

Oklahoma's wage complaint procedures involves:

(1) A letter apprising the employer of the wage complaint, reciting the law and the criminal remedy and asking that the employer respond or pay.

(2) If after the 2nd notice to employer we feel the wages are due and owing based upon the facts, we ask the District Attorney to prosecute. Penalty for failure to pay wages is a misdemeanor—*punishment is up to a $500.00 fine, one (1) year in the county jail, or both.*

In 1983, the Oklahoma Department of Labor received 3,058 claims. During that same year, the Department collected approximately $500,000 on 1,197 claims and referred to civil or criminal court an additional 1,147 claims involving more than $1,000,000.

VERMONT

In Vermont, when an employer has a written policy or other written agreement to pay its employers benefits or wage supplements, then, upon failure to pay such benefits, the employer becomes liable to its employees for actual damages and, in the event of fraud, is subject to criminal prosecution. *See* Title 21, Vermont Statutes Annotated, Section 345a.

A terminated employee who has failed to receive severance pay pursuant to his employer's written policy or agreement may complain to the Wage and Hour Division of the Department of Labor and Industry for assistance. The Wage and Hour Division will investigate the claim and attempt to resolve it on an informal basis. Approximately two thirds of the complaints made to that division are resolved this way. If the unresolved complaint involves fraud, the Department of Labor and Industry will pursue criminal charges against the employer. If no fraud is involved, the employee is told of his right to sue for actual damages, and the Department's investigation file is made available for his use in the lawsuit.

WISCONSIN

The Wisconsin Department of Industry, Labor and Human Relations enforces Chapter 109, Wisconsin Statutes, "Wage Payments, Claims and Collection." This chapter requires employers to pay to every employee, at least once per month or within 15 days after termination, all wages earned. For the purpose of Chapter 109, "wages" are defined to mean remuneration payable to an employee for personal services, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses, and other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy. The Department investigates and tries to adjust controversies between employers and employees as to alleged wage claims. If the Department finds wages are due and an employer refuses to pay, it may file a lawsuit against the employer when the employee has assigned his claim to the Department. Chapter 109 grants a lien to the Department upon the property of an employer for the full amount of any wage claim

assigned to it. This lien is given precedence over all other debts, judgments, decrees, liens or mortgages against the employer. In a case where an employer fails to pay wages as required by Chapter 109, he is subject to both criminal penalties and increased liability of up to 50% of the wages owed. While precise statistics are not available, a significant portion of the wage claims investigated by the Department under Chapter 109 are severance pay claims.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served three (3) copies of the foregoing Brief of the States as *Amici Curiae* Supporting Appellants upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

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This the 16th day of October, 1985.

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